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NO. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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We are filing this supplemental memorandum to advise the Court of a recent decision by the First Circuit addressing the issued raised by the petition in this case. Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., No.

86-1227 (Dec. 19, 1986). (In our brief in opposition (at 37-38 n.13), we noted the pendency of this case.) The First Circuit has adopted a "middle-of-the-road" approach to the question presented, holding that federal jurisdiction will not lie under Section 505 of the Clean Water Act for citizen suits for civil penalties in the case of "matters over and apparently done with" (slip op. 10), but that the district courts do have jurisdiction over suits seeking civil penalties based on good faith allegations of violations of the Act that, if not enjoined, are likely to continue. The court explained its reasoning as follows (slip op. 10-12):

> A violation may last only 10 minutes. Moreover, Section 505(b)(1)(A) requires a sixty-day notice before suit is brought, so that even a persistent violator may, temporarily, "clean up his

act." We therefore think that the words "is . . . in violation" should be sufficiently liberally construed to comport with the injunctive purpose of the Act -- conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one. * * * We would give the full phrase the practical construction that is given to the $10,000 requirement for jurisdiction in a diversity case. There jurisdiction is not necessarily lost if, in the final analysis, a lesser sum is involved; a reasonably held allegation is sufficient. * * * We think the analogy excellent, and that the same construction is warranted [here].

We accordingly hold that an action under [Section 505] may go forward if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act. In reviewing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the

> defendant, and the sincerity of its assurances against future violations.

Insofar as the decision below may be read as sanctioning a citizen suit for civil penalties for a single, past violation, no matter how isolated and old, the First Circuit thus disagreed. At the same time, however, the First Circuit refused to endorse the approach of those district courts that have held, as advocated by petitioner, that Section 505 requires the plaintiff to establish the existence of a violation that was ongoing on the date the complaint was filed. Pawtuxet Cove Marina, slip op. 6, 12.

As we explained in our brief in opposition (at 38-40), petitioner has failed to show that the court of appeals' judgment would be any different even if

one were to adopt an alternative legal rationale. That is precisely what the First Circuit did in Pawtuxet Cove Marina, and is clear that the instant action would readily satisfy the requirements for federal jurisdiction set forth by the First Circuit. There is no question in this case that respondents' complaint contained good faith allegations of continuing violations; the fact that those violations ceased immediately prior to the filing of the complaint would not, under the First Circuit's analysis, defeat federal jurisdiction. Rather, the focus would be on the recurring nature of petitioner's violations and respondents' total inability to know that petitioner had suddenly brought itself into compliance with the Act.

Because petitioner has failed to demonstrate that its theory of jurisdiction has been accepted by any circuit on facts comparable to the facts of this case (see Br. in Opp. 31-40), we again respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted.

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